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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-352

WILLIAMS PIPE LINE COMPANY AND
EXPLORER PIPELINE COMPANY,
Petitioners

v.

FEDERAL ENERGY REGULATORY COMMISSION,
UNITED STATES OF AMERICA, and
FARMERS UNION CENTRAL EXCHANGE, ET AL
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Williams Pipe Line Company (Williams), and Explorer Pipeline Company (Explorer), pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 27, 1978 in proceedings styled *Farmers Union Central Exchange* v. *Federal Energy Regulatory Commission and the United States of America*, No. 76-2138. Both Williams and Explorer are oil pipeline common carriers and both were intervenors in the proceedings before the Court of Appeals.

OPINIONS BELOW

A panel of the United States Court of Appeals for the District of Columbia Circuit has concluded to remand to

the Federal Energy Regulatory Commission (FERC) proceedings litigated before and decided by the Interstate Commerce Commission (ICC) in *Petroleum Products, Williams Bros. Pipe Line Co.*, 351 I.C.C. 102 (1975), and 355 I.C.C. 479 (1976). A copy of the Circuit Court decision is included as Appendix A in the separately bound appendix submitted herewith. Copies of the two opinions of the ICC are set forth in Appendices B and C, and the Initial Decision of the Administrative Law Judge is included as Appendix D.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sections 1254 and 2350. The decision of the Court of Appeals was entered June 27, 1978, and this petition has been filed within 90 days of said date. A petition of Explorer for rehearing with respect to certain issues was denied on July 25, 1978 (Appendix G) and issuance of the mandate has been stayed until September 1, 1978 by order of the Court of Appeals dated August 4, 1978 (Appendix H).

QUESTIONS PRESENTED

1. Did the Court of Appeals act contrary to the Department of Energy Organization Act[1] in remanding to FERC for *de novo* consideration proceedings decided by the ICC with administrative finality prior to the creation of FERC?
2. Did the Court of Appeals, by acquiescing in FERC's request for remand, substitute *de novo* consideration by a newly created administrative agency for the judicial review to which the parties were entitled as a matter of law?

[1] 42 U.S.C. §§7101 *et seq.*

3. Did the Court of Appeals, by refusing to accept the ICC's determination as to how it would deal with industry-wide issues, improperly substitute its judgment for that of the Commission, thereby denying agencies the latitude to use rulemaking proceedings for determining matters impacting on all members of a regulated industry?

STATUTES INVOLVED

The statutory provisions directly involved are several Sections of Part I of the Interstate Commerce Act (49 U.S.C. §§1-27), the Administrative Procedure Act (5 U.S.C. §551 *et seq.*), and the Department of Energy Organization Act (DOE Act), 42 U.S.C. §§7101-7352. These provisions are set forth in the Statutory Appendix included in the separately bound appendix filed with this petition.

STATEMENT OF THE CASE

A. Introduction

This case involves judicial review of decisions of the ICC with respect to the lawfulness of certain rates of Williams and initial joint rates of Williams and Explorer. Apart from recent proceedings involving the Trans Alaska Pipeline System,[2] this is the first major case involving judicial review of an oil pipeline rate decision. Subsequent to the ICC decisions, and to the filing of the petition for review, the oil pipeline regulatory jurisdiction of the ICC was transferred to FERC. Accordingly, this case also involves questions concerning the consequences of that transfer.

[2] *Trans Alaska Pipeline Rate Cases*, U.S. , 46 U.S.L.W. 4587 (June 6, 1978).

Williams is a major pipeline common carrier of petroleum products operating in ten midwestern states ranging from Oklahoma, on the south, to North Dakota and Minnesota, on the north, Unlike almost all oil pipelines, it is not owned by any member of the oil industry. Williams became a petroleum products common carrier in March, 1966, when it purchased the physical assets of Great Lakes Pipe Line Company (Great Lakes). Explorer is a newly constructed pipeline, not affiliated with Williams, built to transport petroleum products from origins on the Gulf Coast to destinations in the Midwest. It first commenced operations on a limited basis in the fall of 1971, and shortly thereafter was able to undertake joint line movements with Williams. The lines of Williams and Explorer physically connect at West Tulsa, Oklahoma.

B. Proceedings Before the Commission

Involved before the ICC were increased rates of Williams published at various dates late in 1971 and early in 1972 which, taken together, constituted a general rate increase. Also involved were initial joint rates of Williams and Explorer published December 28, 1971 from the Gulf Coast origins served by Explorer to 45 midwest destinations served by Williams.

The rate increases of Williams and the initial joint rates of Williams and Explorer were separately protested on quite different grounds by the petitioners below.[3] The rates became effective in ordinary course, however, the ICC denying suspension pending investigation (App. D-5). The Shipper Group also attempted to challenge the same rates before the United States District Court for the District of Kansas, but the District Court dismissed the action on jurisdictional grounds. *American Petrofina Co. of*

[3] Referred to by the ICC, and sometimes herein, as the "Shipper Group."

Texas v. *Williams Bros. Pipeline Co.*, 56 F.R.D. 488 (D. Kan. 1972). Thereupon, the Shipper Group filed a formal complaint challenging the local rates of Williams from August 23, 1970,[4] and the joint rates of Williams and Explorer (App. D-5).

The proceedings were referred to an Administrative Law Judge for hearings. The hearings extended over some twenty hearing days at which sixteen witnesses presented direct testimony and were cross-examined, and, together with exhibits and written submissions, produced a record of many thousands of pages. The Administrative Law Judge rendered his initial decision on June 6, 1974 approving the contested rates in all respects (App. D).

The decision of the Administrative Law Judge was reviewed by Division 2 of the Commission. Based on the record and additional written argument by the parties, the Division fully affirmed the Administrative Law Judge's decision in a written opinion (351 I.C.C. 102, Nov. 5, 1975; App. B). Thereafter, the full Commission, upon reconsideration on its own motion of the Division 2 decision and upon further written submissions of the parties, affirmed the Division 2 decision (355 I.C.C. 479, Dec. 21, 1976; App. C).

Williams justified its rates on numerous grounds. However, in reaching its decision, the ICC relied on only one of these, that Williams' earnings under the involved rates were well below the generally applicable industry standard. In making this finding that Williams' rates and earnings were reasonable, the ICC applied to Williams the standard of reasonableness for petroleum products pipelines that it had first articulated in 1941 in a case in which Great Lakes Pipe Line Company, Williams' predecessor,

[4] The Court of Appeals erroneously assumes that rates only as far back as 1972 are in issue (App. A-26).

had been a respondent/defendant. *Petroleum Rail Shippers Assoc. v. Alton & Southern R.R.*, 243 I.C.C. 589 (1941).[5] By that standard, rates were deemed reasonable if they produced no more than a 10% return on the valuation of the carrier's properties as determined by the ICC under Section 19a of the Interstate Commerce Act.[6] In applying that standard to Williams, the ICC rejected the arguments of the Shipper Group that a new standard should be imposed upon Williams, one never theretofore applied to any oil pipeline carrier, whereby rate levels would be set using a depreciated original cost rate base ("original cost" meaning the cost when the property was first dedicated to public use).

For Williams, this argument held particular significance since it had paid a price for the properties of Great Lakes at arms-length which, while consistent with the then current physical value of those properties, was substantially higher than Great Lakes' depreciated original cost (App. A-4, 18). The Commission accepted Williams' argument that to adopt such an approach in this particular case would have been grossly unfair, particularly where Williams had purchased the Great Lakes properties under a known and well-defined regulatory framework that had been in existence for twenty five years.

However, the ICC did not ignore that its regulatory standard for pipeline rates was itself being chailenged.

[5] While the Court of Appeals appears critical of reference to such a standard as "traditional" or "customary" because of the limited formal decisions in which it has been used, its existence and acceptance by the industry and the ICC cannot be denied. Review of such a standard was one purpose of the rule making proceeding referred to by the ICC in its decision (App. C-9), 13), and the ICC also used the standard as a guide in setting interim rates for the Trans Alaska Pipe Line System, an action affirmed by this Court. *Trans Alaska Pipeline Rate Cases*, U.S. , 46 U.S.L.W. 4587, 4588 n. 13 (June 6, 1978); *Trans Alaska Pipeline System*, 355 I.C.C. 80, 85 (1977).

[6] 49 U.S.C. §19a; App. SA-7 to SA-13.

Thus, while deciding to measure Williams' rates by the existing standard, the ICC at the same time concluded to treat the industry-wide issues raised by the Shipper Group's attack on that standard in a separate rule-making proceeding of general applicability (*Valuation of Oil Pipelines*, Ex Parte 308). This proceeding is still being actively conducted by FERC in its Docket No. RM78-2.

With respect to the initial joint rates, the ICC found in each of the three administrative decisions that the Shipper Group had failed to meets its burden of proof.

C. Proceedings Before the Court of Appeals

The petition for review was filed with the Court of Appeals December 21, 1976. Following the creation of FERC on October 1, 1977, that agency moved the court to remand the record to it "so that it can consider the issues presented and be free to issue any subsequent orders." Williams and Explorer opposed that motion, claiming it to be a direct violation of the DOE Act and an abuse of FERC's administrative discretion. By order dated November 21, 1977, FERC's motion was denied by the Court of Appeals. Consequently in the Court of Appeals, not only the private parties, but also FERC and the ICC lined up on opposite sides. The ICC supported its decisions. However, the Department of Justice, speaking for the statutory defendant, the United States, confessed error as to the local rates (but took no position as to the joint rates) and also urged remand to FERC.[7]

[7] The Department of Justice plainly considers the issues to be of national significance. As Assistant Attorney General Shenefield recently indicated, the Department is using its position as spokesman for the United States in this case to advance its objective of reducing the market value of *all* oil pipelines in anticipation of achieving mandatory divestiture of pipeline ownership by the oil industry (App. F). Even assuming that such an objective is appropriate, there is no reason why

On June 27, 1978 the Court of Appeals issued its decision remanding the proceedings to FERC on all but one issue, that of claimed discrimination under Section 2 of the Interstate Commerce Act. In its decision, the Court of Appeals was critical of the "return on valuation" standard that the ICC had used in evaluating the reasonableness of Williams' rates, devoting a large part of its decision to the expression of its views against the use of a valuation rate base in any ratemaking proceeding.[8] Recognizing that there appeared to be factual as well as legal reasons whereby any new ratemaking standard should not be applied retroactively to Williams, the Court of Appeals nevertheless declined to endorse the manner in which the ICC took such factors into account, i.e., by dealing with the future status of the standard in a separate rulemaking proceeding.

Moreover, despite specific language of the Department of Energy Organization Act that existing cases were to be dealt with "as if this chapter had not been enacted",[9] the Court concluded that the transfer of regulatory authority from the ICC to FERC "has deprived us of even the possibility of endorsing ICC's attempt to develop" its own approach to its regulatory tasks (App. A-16). On this basis, the Circuit Court declined even to consider the propriety of the ICC's judgment in this

it cannot be pursued by the Department in the pending FERC rulemaking case, and, in fact, it is. Affirmance of the ICC's exercise of its discretion under the unique facts of this case can in no way limit FERC's discretion to consider prospective changes in the pipeline ratemaking standard advocated by the Department of Justice or anyone else.

[8] The Court's discomfort is not shared by Congress. Although the Court of Appeals criticized the Commission's use of a valuation base for pipelines as being inconsistent with changed ratemaking standards for railroads, the House of Representatives explicitly approved the continued use of valuation as the rate base for oil pipelines, while modifying the ratemaking procedure for railroads. H.R. Rep. No. 93-1381, 93d Cong., 2d Sess. 26 n.1 (1974).

[9] 42 U.S.C. §7295(c)

regard. Instead, and notwithstanding the still pending rule making proceeding started by the ICC and continued by FERC, it offered its critique of the ICC's "traditional" standard, and proceeded to grant FERC's request for a remand so that it might "begin its regulatory duties in this area with a clean slate" (App. A-19, 25).

As to the joint rates the Court declined to review the ICC's decision that the Shipper Group had failed to sustain its burden of proof. It reached this conclusion in part at least because the FERC might, on remand, change Williams' local rates and thereby affect, because of the resulting change in the rate relationship, the question as to the lawfulness of the joint rates (App. A-27, 28).

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision directly contradicts provisions of the recently enacted DOE Act governing the transfer of regulatory authority over oil pipelines from the ICC to FERC. That legislation specifically calls for effectuation of that transfer with no substantive impact on pending proceedings. Yet, in spite of that plain language in the Act, FERC sought remand of these proceedings decided by the ICC in 1976 involving pipeline rates as far back as 1970, and also despite such language the Court of Appeals consented to FERC's request for retroactive jurisdiction. This interpretation of the Act necessarily impacts not only on any pending proceedings before FERC involving other pipelines, but necessarily casts doubt on the rates of all oil pipelines, not merely for the future (where FERC has acknowledged jurisdiction) but for the past as well.[10] By granting FERC the author-

[10] See 49 U.S.C. §§13(1), 16(1), 16(3)(b), which permit the filing of complaints seeking reparations with respect to shipments as far back as two years prior to the filing date.

ity to act as a "Monday morning quarterback" as to *past* pipeline rates, the Court of Appeals has virtually guaranteed the fulfillment of its own prophecy that the present case, although the first "judicial foray into the area of oil pipeline ratemaking," is "almost assuredly" not the last (App. A-17, n. 24). By permitting retroactive application of whatever changes in policy this new agency may develop, the Court of Appeals' decision has major consequences for an entire industry.

Second, the Court's decision raises serious questions of the relative roles of agency and reviewing court, questions on which this Court only recently had occasion to instruct this same Court of Appeals. *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc.*, U.S. , 46 U.S.L.W. 4301 (April 3, 1978). In its *Vermont Yankee* opinion this Court noted the particular significance of decisions of the Court of Appeals for the District of Columbia Circuit in the field of administrative law. *Vermont Yankee, supra*, 46 U.S.L.W. at 4305 n.14. Just as in that case, the Court of Appeals in the present case has seriously misperceived the proper scope of its function. That misperception is found not only in its refusal even to consider the propriety of ICC's approach to its regulatory responsibility and in its freely proffered advice on economics and the use of a valuation rate base, but also in particularly revealing statements in its opinion.

Thus, the Court of Appeals stated that apart from the provisions of the Interstate Commerce Act," . . . we [the Court of Appeals] have little to rely on in constructing a theory of oil pipeline ratemaking" (App. A-9). Similarly, at a later point in its opinion, the Court of Appeals decried its ability under current circumstances to make a "reasonableness" determination with respect to Williams' rates even were it to look at the record (App. A-25). Ratemaking theories and reasonableness determinations are

not for the Court of Appeals to make: they are the function of the agency, in this case the ICC. That agency's conclusions are not to be overturned merely because the reviewing Court might, if it had the regulatory responsibility, deal otherwise with the matter. *Vermont Yankee, supra*, 46 U.S.L.W. at 4311; *Consolo* v. *Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966); *American Commercial Lines, Inc.* v. *Louisville & N.R.Co.*, 392 U.S.571, 590-593 (1968).

Agency proceedings are not intended to go on indefinitely, to be reopened for reconsideration or rehearing with each changed circumstance. *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503, 514-515 (1944). If such were the case, administrative proceedings would never end. Yet the Court of Appeals would send this case back as though the litigation of several years, and the two ICC decisions had never occurred.

Having misconceived its role, the Court of Appeals brushed aside the ICC's exercise of discretion in choosing how to deal with industry-wide issues, advanced its own views as to the current applicability of the existing regulatory standard and ordered the case remanded to FERC, the ICC's successor-agency, for a decision *de novo*.

The decision thus has important national significance in terms of FERC's jurisdiction over past, as contrasted with future, oil pipeline rates, and in terms of judicial review of administrative decisions generally. As to the latter, even though FERC sought the unlimited remand granted by the Court of Appeals, a decision overruling the ICC's use of its regulatory discretion is bound to restrict the scope of discretion of all agencies—including FERC—in their use of rulemaking as a means of adopting industry-wide criteria.

I. BY ACQUIESCING IN FERC'S REMAND REQUEST, THE COURT OF APPEALS PERMITTED A RETROACTIVE EXTENSION OF FERC'S JURISDICTION CONTRARY TO THE EXPRESS PROVISIONS OF THE DOE ACT.

Although the Court of Appeals found what it described as "blemishes" in the ICC's decision, it stated that what "clinches our decision to remand on the reasonableness issue" was FERC's request for such a remand "so that it may begin its regulatory duties in this area with a clean slate" (App. A-28).[11] The DOE Act contemplates no such relitigation by FERC of a case long since fully tried and administratively decided. To the contrary, the legislative history of the Act, as well as its language, plainly demonstrate that Congress intended no substantive changes to occur as a consequence of the transfer.

The DOE Act speaks in no uncertain terms. The Act states specifically that its provisions are not to affect suits commenced prior to the effective date, a category clearly encompassing this case, and in such suits judgments are to be "rendered in the same manner and effect as if this chapter had not been enacted."[12]

These words mean what they say. Any suggestion to the contrary is refuted by the legislative history which shows that Congress thought it was accomplishing the jurisdictional shift without producing substantive con-

[11] How redeciding this case is deemed necessary to clean FERC's slate is unclear, and the Court of Appeals' decision does not illumine the point. FERC's authority to deal with future rates of the industry cannot fairly be said to be affected by this case with its most unique set of facts. In fact, FERC is proceeding with an industry-wide rulemaking case with no apparent inhibitions, a course of action inconsistent with a "clean slate" plea. In any event, the DOE Act contains no provision warranting use of such a claim as a basis for deciding once again cases already finally decided by the ICC.

[12] 42 U.S.C. §7295(c).

sequences for litigation in process. The Conference Committee stated:

> "Judicial review of final agency action taken by the Commission or proceedings now under way which are transferred from the ICC, as well as new proceedings initiated by the Commission, will continue to be made in the same manner as if the functions had been retained in the ICC." Sen. Rep. No. 95-367, 95th Cong., 1st Sess., Conf. Report to Accompany S. 826, July 27, 1977, at p. 79.

The same intent was evidenced in the Report of the Committee on Government Operations of the House of Representatives, which stated:

> "However, the provisions of this Act shall not affect judicial proceedings commenced prior to the effective date of this Act." H.R. Rep. No. 95-346 Part I, 95th Cong. 1st Sess. to Accompany H.R. 6804, May 16, 1977, at p. 32.

In its report on the bill, the Senate Committee on Governmental Affairs spoke with approval concerning the ICC's regulation of oil pipelines and the significance of regulatory continuity, in the following terms:

> "Section 306 transfers functions related to the transportation of oil by pipeline as set forth in the Interstate Commerce Act and vested by law in the ICC or the Chairman and members thereof. While the processes and procedures of the ICC, including annual valuations and review, have in the past provided a stable regulatory framework, the committee agrees that the transfer would facilitate decisionmaking with regard to the transportation of this important energy resource. Recognizing the importance of regulatory continuity, the committee proposes no

substantive changes in the existing method of regulation under the Interstate Commerce Act." Sen. Rep. No. 95-164, 95th Cong., 1st Sess. Report of Comm. on Gov. Affairs, at p. 35.

To the same effect is a reported colloquy between Senator Ribicoff, the floor manager of the legislation when the Conference Report was before the Senate, and Senator Hansen, as follows:

"MR. HANSEN. Finally Mr. Chairman, I am greatly concerned that we are placing responsibilities and authorities in this Commission for which there will not be initially a full capability to discharge them, because much of the expertise, background analyses, and understanding of this oil pipeline regulation[s] will necessarily remain at the ICC. Would the Senator agree that the ICC and its staff should provide the assistance that the Commission may require and request, on a reimbursable basis and pursuant to such agreement as the two Commissions may enter into, as necessary to insure that during the transition period the new Commission has available all of the requisite expertise, background files and analyses, investigatory capability, legal support and other assistance from the ICC that the new Commission needs to assure continuity and consistency in the administration of the transferred function?

MR. RIBICOFF. I agree with the Senator completely. Certainly, it is our clear intention that the transferred ICC regulatory functions, as well as all other, will be fully and competently exercised by the new Commission with a maximum degree of continuity and consistency.

MR. HANSEN. I sincerely thank the distinguished Senator for his remarks and I want to express my great pleasure in having this opportunity to work closely with the Senator from Connecticut in fashioning this legislative history on this issue. I would hope that this colloquy will provide clear guidance for the establishment of the Department and the new Commission, and for any reviewing court, regarding the intent of this report for the future regulation of the transportation of oil by pipeline." (Cong. Rec., S 13283, Aug. 2, 1977).

Congress intended "continuity and consistency" in the regulation of this industry as an intended part of the jurisdictional shift. It did not intend that the shift would be used by the new agency (FERC) as a reason for redeciding cases tried by its predecessor. Nor did it intend, with respect to the joint rates and the complaint case, that the Shipper Group that failed to meet its burden of proof would be given a second opportunity to meet that burden merely because a new agency now had the regulatory responsibility. It may very well be that FERC will have different ideas than the ICC as to how best to perform its obligations. But that fact of human nature was not intended by Congress to be an excuse for retroactive imposition of FERC's views. There is no warrant whatsoever for the use of FERC's creation as a reason for permitting it to decide an old case all over again. To the contrary, the Court of Appeals' reliance on FERC's "clean slate" request violates the statutory intent.

The Court of Appeals was also wrong in concluding that the transfer of jurisdiction out of the ICC in some way barred the Court from affirming that agency's regulatory approach (App. A-16). Again, as noted above the statute and its legislative history are directly to the contrary.

The language used by Congress in §7295(c) of the DOE Act with respect to pending suits is virtually identi-

cal to the language it used in the Communications Act of 1934, when certain regulatory authority of the ICC, the former Federal Radio Commission and the Postmaster General was transferred to the newly formed Federal Communications Commission.[13] It would appear that Congressional draftsmen consider such language sufficient to accomplish the purposes that the legislative history of the DOE Act indicates were intended. The Court of Appeals' decision in this case would thwart those purposes. Congress is entitled to be told what it must do to assure itself that only the substantive changes it intends, and no more, will accompany adoption of statutes rearranging jurisdiction among federal agencies.

II. BY ITS DECISION, THE COURT OF APPEALS HAS DEPRIVED WILLIAMS AND EXPLORER OF THE JUDICIAL REVIEW TO WHICH THEY ARE ENTITLED.

The Court of Appeals refused even to consider the ICC's decision in terms of what it actually was—a decision to decide a specific case using its existing industry standard coupled with review of that standard in a rulemaking proceeding. Williams' and Explorer's rates were challenged before and considered by the ICC long before FERC was even proposed. The ICC's decisions finding those rates lawful were and are subject to review under well accepted standards. Those standards were not changed one iota by the DOE Act, and there is no support for a conclusion that parties to pending review cases were intended to be penalized by the transfer to FERC. The Court of Appeals refused to review the ICC's decision on the merits, either as to the propriety of its regulatory approach or as to whether its conclusion had record support (App. A-16, 25). Had it done either, it could only have affirmed the ICC.

[13] 47 U.S.C. §604(d).

Williams and Explorer are entitled to have the ICC's decisions sustaining their rates judged in accordance with the legislative intent, in a way that does not prejudice them because the DOE Act was passed. By acceding to FERC's remand request, the Court of Appeals deprived Williams and Explorer of that right, and improperly continued the cloud over the revenues of those companies that has already lasted for some eight years.

III. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF THIS COURT AS TO THE APPROPRIATE FUNCTIONS OF AGENCY AND JUDICIARY IN ADMINISTRATIVE CASES.

That the scope of judicial review of the decisions of administrative agencies is limited cannot be denied, and this fact is purportedly recognized by the Court of Appeals (App. A-25). Nor can it be denied that this general proposition has direct application to decisions of the ICC in rate cases. *Atchison T. & S.F. Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 805 (1973). Moreover, it is also clear that regulatory agencies are entitled to wide latitude in deciding how they will deal with their regulatory responsibilities, *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), and that this latitude extends to decisions on whether to deal with industry-wide issues in rulemaking or in adjudicatory proceedings. *American Commercial Lines, Inc. v. Louisville & N.R. Co.*, 392 U.S. 571 (1968). See also *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 292-295 (1974); *SEC* v. *Chenery*, 332 U.S. 194, 201 (1947). Administrative decisions are to be overturned only for "substantial procedural or substantive reasons as mandated by statute." *Vermont Yankee* case *supra*, 46 U.S.L.W. at 4311.

In the present case, the Court of Appeals never dealt with the real issue before it, the propriety of the overall regulatory approach decided upon by the I.C.C., concluding (erroneously) that it could not effectively do so because of the transfer of ICC's oil pipeline duties to

FERC. The Court of Appeals therefore never found the ICC's action arbitrary or capricious, or unsupported by the record, stating only that it was "not persuaded" by the ICC's finding[14] that "consistency and fairness" required the approach used (App. A-20). That the Court of Appeals might have reached a different conclusion than the ICC on how to deal with the issues is irrelevant.

It is not only significant but also ironic that the same Court that was "not persuaded" by the ICC's conclusion as to what considerations of consistency and fairness require appeared to endorse in substance the result reached by the ICC. The Court of Appeals recognized the unfairness that would result from changing regulatory standards retroactively, particularly under the unique circumstances of this case where Williams had paid a substantial price to acquire its pipeline under a long-standing regulatory approach. The Court stated (App. A-20):

> "And, to the extent that Williams, having nothing else to depend on but the earlier cases, justifiably relied on them in adopting its rates, see *id.*, the solution is not to perpetuate that reliance but to end it *prospectively* without allowing reparations based on its occurrence in the past." (emphasis added)

The Court of Appeals, like the ICC, was thus contemplating regulatory change, if at all, on a prospective basis. This forward-looking thrust to the Court's own opinion, therefore, lends implicit support to the judgment of the agency whose decision the Court declined to affirm.[15] The ICC's findings as to what consistency and fairness required are patently proper and consistent with the Court of Appeals' own view of the case.

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[14] App. C-9; 355 I.C.C. at 484.

[15] Elsewhere the Court of Appeals also suggested that Williams may be protected, as a matter of law, from any possible reparations order under the circumstances of this case, further indicating its view that the remand proceedings would be prospective only in their impact (App. A-29)

Williams and Explorer heartily agree that any change in the existing standard should be prospective only. In those terms, however, this case is essentially moot, both the local rates and the joint rates involved in this case having been superseded on many occasions. The local rates of Williams were last changed September 25, 1977 without suspension or investigation (Appendix E), and the current joint rates became effective March 8, 1978 without protest. Accordingly the rates and rate relationships under investigation by the ICC no longer exist. Such changes moot the issue as to the lawfulness of the joint rates for the additional reason that the Shipper Group presented no evidence of damage resulting from their claim of a §3(1) violation.

That a regulatory agency has the latitude to perform its duties in the manner adopted by the ICC here was directly decided by this Court in *American Commercial Lines, Inc. v. Louisville & N. R. Co.*, 392 U.S. 571, 590-592 (1968). There, as here, the ICC chose to pass on proposed rates using its traditional criteria while considering possible changes in those criteria in a rulemaking case. The three-judge District Court overruled the Commission but this Court reversed, finding that the ICC had acted within its proper discretion. The case is directly in point and requires affirmance of the ICC actions in the present case.

Nor does the ICC's conclusion to give separate consideration to its standard in a rulemaking case provide warrant for the Court of Appeals' exposition of its views as to the current efficacy of that standard. Such views as to the propriety of the use of a "fair value" rate base, current economic conditions in the pipeline industry, and the present adequacy of the traditional return on valuation standard are matters properly to be addressed by the agency as it intended—in the rule-making case established for that purpose. The Court's expansive views on these matters are subject to the same criticism that this

Court applied to the three-judge District Court in the *American Commercial Lines* case, *supra*. The District Court had also chosen to tell the ICC how it felt the agency's standards should be changed. This Court chided the lower court for effectively "mooting" the rule-making proceeding before it started (*American Commercial Lines*, *supra*, 392 U.S. at 591). The decision of the Court of Appeals can be characterized in the same terms.[16]

Under the Court of Appeals' approach the authority of an administrative agency to set standards for rate regulation in broad-based quasi-legislative proceedings would be severely undermined. No determination of the lawfulness of rates based on industry-wide standards would hereafter be safe in any proceeding instituted to challenge effective, new or increased rates absent at least some evidence justifying anew the established standards. The public interest benefits of having accepted standards, consistently applied would be lost, as would the benefits to regulated industry of knowing how the reasonableness of its rates would be measured so long as a given standard remained unchanged.

The incorrect concept of the Court of Appeals of its review function is further evidenced by its refusal to do what it agrees would normally be done, i.e. look beyond the ICC decisions to the record itself (App. A-25).[17] The

[16] The Court of Appeals' criticism of the continued use of a valuation rate base would also turn the *Hope* case (*FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944)), inside out, by converting a decision endorsing agency discretion as to rate base to one forbidding use of a particular type. The Court of Appeals would also effectively repeal §19a of the Interstate Commerce Act (49 U.S.C. §19a) by placing the use of valuations under that section for ratemaking purposes beyond the agency's discretion.

[17] Notwithstanding this stated refusal to look at the record, the Court indulged in selective record-dipping in its criticism of the ICC's pipeline ratemaking standard and its depreciation expense finding (A-22 to A-25). In both instances, the full record on the particular point was not reviewed.

Court's refusal to do so here was stated to be because of what it characterized as a "lack of viable precedents" in the area of pipeline ratemaking. This statement is consistent with the Court of Appeals' obvious view that the return on valuation standard was being tried, when the issue before the Court was the lawfulness of the ICC's *pro tempore* use of that standard under the circumstances of this case. Since that conclusion of the ICC was in turn based on considerations of "consistency and fairness," which the Court does not claim to be inappropriate, the record need only be searched for supporting evidence for those findings—not a difficult task.

The Court of Appeals' decision would improperly deprive the ICC, FERC, or any other agency of the right to use industry-wide standards in deciding individual cases. It would also deprive regulated companies of the right to rely on those standards until changed.

CONCLUSION

The Court of Appeals' decision directly violated the mandate of the DOE Act, and the plain Congressional intent, that pending cases are not to be substantively affected by the transfer to FERC of ICC's oil pipeline responsibilities. As a consequence, Williams and Explorer have been deprived of their right to have the ICC's decisions reviewed on the merits.

Moreoever, while the Court's decision has adversely affected Williams and Explorer, it has done much more. The decision has cast doubt upon the propriety of all oil pipeline rates published in reliance on the ICC's long-accepted standards. The importance of oil pipelines to the national interest was recognized by their inclusion as one of the industries to be brought under the DOE Act, and this Court should act to remove the uncertainty over that industry's rates created by the Court of Appeals' decision.

Furthermore, the decision below contradicts decisions of this Court as to the breadth of agency discretion and the limits of the scope of judicial review. The Court of Appeals' decision, if allowed to stand, would have impact far beyond this case and would undermine principles heretofore established by this Court. The decision would severely restrict, if not eliminate, the discretion of regulatory agencies in choosing how to deal with complex, industry-wide issues of national import.

This Court should therefore grant this Petition for Certiorari, review the issues raised on their merits, and thereupon reverse the decision of the Court of Appeals and direct affirmance of the orders of the ICC.

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